Ruzain bin Zainudin & Anor v RHB Bank Bhd

HIGH COURT (KUALA LUMPUR) — SUIT NO 22NCVC-186 OF 2011
AMELIA TEE ABDULLAH J
8 OCTOBER 2011

Banking — Banks and banking business — Order for sale — Whether bank could rely on deed of assignment to auction secured property when individual title had been issued

Banking — Securities for advances — Sale of — Whether any impropriety in sale of securities — Whether defendants knew of auction of property — Whether bank could rely on deed of assignment to auction the property when individual title had been issued — Whether reserve price for auction properly fixed

Land Law — Charge — Order for sale — Whether bank could rely on deed of assignment to auction secured property when individual title had been issued

The plaintiffs claimed against the defendant for damages arising from the alleged wrongful and illegal auction of the plaintiffs' property financed by the defendant. The defendant contended that the auction was carried out in accordance with security documents and with the full knowledge of the plaintiffs. The plaintiffs admitted that they were in arrears of their repayments and that under the relevant deed of assignment, the defendant had the right and power to sell the assigned property if there was an event of default. The defendant had earlier entered a judgment in default ('JID') was entered against the plaintiffs. The plaintiffs claimed that they were not aware of the action or the JID. The plaintiffs also claimed to have no knowledge at all as regards the public auction. In order to settle the outstanding dues, the plaintiffs had discussed with the defendant about the withdrawal of EPF contributions to settle the arrears. However, their application was subsequently rejected by KWSP. It was also contended by the plaintiffs that since the individual title for the property had been since issued, the defendant could no longer rely on the deed of assignment to dispose of the said property via public auction. According to the plaintiffs, under the provisions of cl 4.6.2 of the deed of assignment, the defendant 'MUST' issue a notice to the plaintiffs requesting them to execute the memorandum of transfer and charge documents. Thereafter, it would have to obtain an order for sale from the court under O 83 of the Rules of the High Court 1980. The plaintiffs further contended that the

reserve price of RM220,000 fixed for the said property was far lower than the market value of the said property.

Held, dismissing the plaintiffs' claim with costs:

(1) The explanation of the second plaintiff to the effect that they had not known about the JID was less than convincing. At the very latest, on, or about June 2009, the plaintiffs had known about the proposed auction of the said property. This could be seen from the plaintiffs' own letter where the plaintiffs had admitted that the notice of auction had been hung at the gate of the house. The plaintiffs had updated their account by paying RM7,000 before the date of the auction and the defendant had not proceeded with the auction. However, from the plaintiffs' own account, they had thereafter been still inconsistent in meeting their monthly payments (see para 30).

(2) The defendant had produced proof that two notices of public auction were duly sent to the plaintiffs. There was also evidence that the proclamation of sale was advertised. In light of this and the second plaintiff's own admission that she had never given any proper notice to the defendant as to any change of address, the defendant had duly and properly informed the plaintiffs about the auction date (see parsa 32 & 34).

(3) There was nothing in the agreement which made it a *must* for the defendant to issue a notice to the plaintiffs to execute the memorandum of transfer and charge. On the contrary, it was an obligation on the plaintiffs themselves to take a transfer of and to execute a first legal charge in favour of the defendant (see para 37).

(4) The issuance of the individual title for the said property did not mean that the defendant could no longer rely on the deed of assignment. The absolute assignment was *not* extinguished and that the plaintiffs' contention that the defendant could no longer rely on it to dispose of the said property by public auction was totally without basis. The provisions of cll 4.6.2 and 4.7 were so worded to protect the lender if the borrower was negligent or refused to execute a charge in the lender's favour. It cannot be used against the lender who is attempting to release his security following the default of the borrower in a situation where the individual title has been issued by the land authority but no charge has been executed by the borrower. The defendant was entitled to proceed based on the deed of assignment (see paras 45–46); *Hong Leong Bank Berhad v Goh Sin Khai* [2005] 3 MLJ 154 referred.

(5) The issues raised by the plaintiffs as regards whether the defendant should have issued a letter of demand, a notice of termination or a 'notis penamatan' were non-starters. Under the deed of assignment, the

defendant was entitled to proceed to auction off the property in the event of a default, and this had clearly occurred in this case (see para 46).

(6) The plaintiffs cannot expect the defendant to call off a scheduled auction merely on the strength of an application to withdraw some EPF contributions for payment towards reducing a housing loan (see para 47).

(7) In relation to the market value of the property, there was no evidence pointing to lack of good faith or some deliberate or willful misconduct on the part of the defendant. The defendant was entitled to rely on the valuation report of VP Alliance in fixing the reserve price of RM220,000. In any event, the said property sold at RM262,000 and that was the true commercial value of the said property (see para 54).

[Bahasa Malaysia summary

Plaintif-plaintif menuntut terhadap defendan untuk ganti rugi yang berbangkit daripada dakwaan lelongan salah dan tidak sah atas hartanah plaintif-plaintif yang dibiayai oleh defendan. Defendan menghujah bahawa lelongan tersebut dijalankan menurut dokumen-dokumen sekuriti dan dengan pengetahuan penuh plaintif-plaintif. Plaintif-plaintif mengakui bahawa mereka mempunyai tunggakan bayaran balik mereka dan di bawah perintah peletakhakkan, defendan mempunyai hak dan kuasa untuk menjual hartanah yang diletakhakkan jika gagal membayar balik. Defendan sebelum itu memasukkan penghakiman ingkar ('PI') terhadap plaintif-plaintif. Plaintif-plaintif menyatakan bahawa mereka tidak tahu mengenai tindakan tersebut atau PI tersebut. Plaintif-plaintif juga menyatakan tiada pengetahuan langsung mengenai lelongan awam tersebut. Untuk menyelesaikan tunggakan, plaintif-plaintif mengadakan perbincangan dengan defendan mengenai pengeluaran sumbangan KWSP untuk menyelesaikan tunggakan tersebut. Walau bagaimanapun, permohonan mereka kemudiannya ditolak oleh KWSP. Juga dihujah oleh plaintif-plaintif bahawa oleh sebab hak milik individu bagi hartanah tersebut telah dikeluarkan defendan tidak lagi boleh bersandar atas perintah peletakhakkan untuk melupuskan hartanah tersebut melalui lelongan awam. Menurut plaintif-plaintif, di bawah peruntukan klausa 4.6.2 perintah peletakhakkan, defendan 'must' mengeluarkan notis kepada plaintif-plaintif meminta mereka memeterai dokumen-dokumen memorandum pindah milik dan gadaian. Kemudian, ia perlu memperoleh perintah jualan daripada mahkamah di bawah A 83 Kaedah-Kaedah Mahkamah Tinggi 1980. Plaintif-plaintif selanjutnya menghujah bahawa harga rizab RM220,000 ditentukan untuk hartanah tersebut amat kurang daripada nilai pasaran hartanah tersebut.

Diputuskan, menolak tuntutan plaintif-plaintif dengan kos:

(1) Penjelasan plaintif kedua bahawa mereka tiada pengetahuan mengenai PI adalah jauh daripada meyakinkan. Paling terkini, pada atau sekitar bulan

Jun 2009, plaintif-plaintif telah mengetahui mengenai cadangan lelongan hartanah tersebut. Ini boleh dilihat daripada surat plaintif-plaintif sendiri di mana plaintif-plaintif mengakui bahawa notis lelongan telah digantungkan di pintu pagar rumah tersebut. Plaintif-plaintif telah mengemaskini akaun mereka dengan membayar RM7,000 sebelum tarikh lelongan dan defendan tidak meneruskan dengan lelongan. Walau bagaimanapun, plaintif-plaintif sendiri, telah kemudiannya tidak bertindak dengan konsisten dalam membayar ansuran bulanan mereka (lihat perenggan 30).

(2) Defendan telah mengemukakan bukti bahawa dua notis lelongan awam telah dihantar kepada plaintif-plaintif dengan sepatutnya. Terdapat juga keterangan bahawa perisytiharan jualan telah diiklankan. Dengan itu dan atas pengakuan plaintif kedua sendiri bahawa dia tidak pernah memberikan apa-apa notis yang patut kepada defendan mengenai pertukaran alamat, defendan telah dengan sepatutnya dan wajar memberitahu plaintif-plaintif mengenai tarikh lelongan tersebut (lihat perenggan 32 & 34).

(3) Tidak ada apa-apa di dalam perjanjian tersebut yang menjadikan ia 'must' bagi defendan untuk mengeluarkan notis kepada plaintif-plaintif untuk memeterai memorandum pindah milik dan gadaian. Sebaliknya, ia adalah obligasi plaintif-plaintif sendiri untuk mengambil pindah milik dan menandatangani gadaian sah pertama bagi pihak defendan (lihat perenggan 37).

(4) Pengeluaran hak milik individu hartanah tersebut tidak bermaksud bahawa defendan tidak boleh lagi bersandar atas perintah peletakhakkan. Peletakhakkan mutlak tidak dilenyapkan dan hujahan plaintif-plaintif bahawa defendan tidak lagi boleh bersandar ke atasnya untuk melupuskan hartanah tersebut melalui lelongan awam adalah tidak berasas langsung. Peruntukan klausa-klausa 4.6.2 dan 4.7 dibuat sedemikian untuk melindungi pemberi pinjam jika peminjam cuai atau enggan memeterai gadaian bagi pihak pemberi pinjam. Ia tidak boleh digunakan terhadap pemberi pinjam yang mencuba untuk melepaskan sekuritinya berikutan kegagalan peminjam dalam suatu situasi di mana hak milik individu telah dikeluarkan oleh pihak berkuasa tanah tetapi tidak ada gadaian dimeterai oleh peminjam. Defendan berhak untuk meneruskan berdasarkan kepada perintah peletakhakkan (lihat perenggan 45–46); *Hong Leong Bank Berhad v Goh Sin Khai* [2005] 3 MLJ 154 dirujuk.

(5) Isu-isu yang dibangkitkan oleh plaintif-plaintif mengenai sama ada defendan sepatutnya mengeluarkan surat tuntutan, notis penamatan adalah bukan permulaan. Di bawah perintah peletakhakkan, defendan berhak untuk meneruskan untuk melelong hartanah tersebut jika gagal membayar, dan ini jelas terjadi di dalam kes ini (lihat perenggan 46).

(6) Plaintif-plaintif tidak boleh mengharapkan defendan membatalkan lelongan yang dijadualkan semata-mata atas kekuatan permohonan pengeluaran wang sumbangan KWSP untuk bayaran mengurangkan pinjaman perumahan (lihat perenggan 47).

(7) Berkaitan dengan nilai pasaran hartanah tersebut, tidak ada keterangan yang menunjukkan kepada ketiadaan niat baik atau salah laku yang sengaja dan cuai oleh pihak defendan. Defendan berhak untuk bergantung pada laporan penilaian VP Alliance dalam menetapkan harga rizab RM220,000. Walau bagaimanapun, hartanah tersebut dijual pada harga RM262,000 dan ia adalah nilai komersial sebenar hartanah tersebut (lihat perenggan 54).]

Notes

For a case on sale of securities for advances, see 1(2) *Mallal's Digest* (4th Ed, 2010 Reissue) para 2648.

For cases on banks and banking business in general, see 1(2) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 2187–2357.

For cases on order for sale, see 8(2) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 2614–2775.

Cases referred to

Bank Kerjasama Rakyat Malaysia v Daya Plaza Sdn Bhd; Empire Possession Sdn Bhd (Intervener) [1998] 5 CLJ 79, HC (refd)

Hong Leong Bank Bhd v Goh Sin Khai [2005] 3 MLJ 154; [2005] 3 CLJ 24, HC (folld)

Malayan Banking Bhd v Lim Poh Ho & Anor [1997] 1 MLJ 662; [1997] 2 CLJ 516, CA (refd)

Ng Tiou Hong v Collector of Land Revenue, Gombak [1984] 2 MLJ 35; [1984] 1 CLJ (Rep) 289, FC (refd)

Ooi Chin Nee v Citibank Bhd [2003] 1 CLJ 548, HC (not folld)

People Realty Sdn Bhd v Hong Leong Bank Berhad & Anor [2007] 6 MLJ 595; [2008] 1 CLJ 73, CA (refd)

PhileoAllied Bank (M) Bhd v Bupinder Singh a/l Avatar Singh & Anor [2002] 2 MLJ 513; [2002] 2 CLJ 621, FC (distd)

Legislation referred to

National Land Code
Rules of the High Court 1980 O 31 r1, O 83

Amelda Md Din (Amelda & Partners) for the plaintiffs.
R Santhi (Ghani & Co) for the defendant.

Amelia Tee Abdullah J:

[1] The claim of the plaintiffs, Ruzain bin Zainudin ('the first plainitff') and Mas Widayu bt Abu Bakar ('the second plaintiff'), against the defendant, RHB Bank Bhd, is for special damages of RM300,000, general and aggravated damages of RM50,000, interest, legal fees and costs arising from the alleged wrongful and illegal auction of the plaintiffs' property financed by the defendant. The plaintiffs' claim is disputed by the defendant on the grounds that the auction was carried out in accordance with security documents and with the full knowledge of the plaintiffs whereby the power was exercised due to the plaintiffs' breach of the security documents.

THE PLAINTIFFS' CASE

[2] The plaintiffs had entered into a sale and purchase agreement dated 30 January 2005 with Araprop Development Sdn Bhd for the purchase of a semi-detached house known as Lot No SD5A-244, House Type Aludra, Bandar Bukit Mahkota, Bangi held under Master Title 50879, Lot No 4269 Mukim Beranang, Daerah Ulu Langat, Selangor Darul Ehsan with a postal address of No 8, Jalan BM 6/17B, Seksyen 6, Bandar Bukit Mahkota, 43000 Kajang, Selangor Darul Ehsan for the price of RM216,600 ('the said property').

[3] The plaintiffs paid a deposit of 10% of the purchase price amounting to RM21,660. The balance of the purchase price was financed through a housing loan from the defendant. The letter of offer for banking facility from the defendant dated 8 February 2005 would show that the amount of the facility offered was RM201,297.97 made up of a loan sum of RM194,940 and MRTA/CLTA premium of RM6,357.97. It is not in dispute that the facilities agreement, the deed of assignment and the power of attorney, all dated 8 April 2005 were executed between the two parties.

[4] The second plaintiff, Mas Widayu bt Abu Bakar, does not deny that the plaintiffs were in arrears of their repayments. They were admittedly not consistent in the repayment of their loan installments. During cross-examination, she agreed that cl 13.1 of the facilities agreement provides that if the borrower defaults in the payment of any amount due under the facility, there will be an 'Event of Default'. She further agreed that under cl 5.1.3 of the deed of assignment, the defendant would have the right and power to sell the assigned property if there was an event of default.

[5] On 12 December 2008, judgment in default was entered against the plaintiffs in Sessions Court Summons No 2–52–31006 of 2008 for a sum of

RM210,369.59 as at 30 June 2008, interests and costs. The second plaintiff contends that the plaintiffs had never received the summons and the statement of claim. However, she could not deny that they had never applied to set aside the judgment in default. She offered the explanation that she had not done so because she had not known about it. The plaintiffs had then updated their account when RM7,000 was paid before the date of the auction. Vide a letter dated 6 July 2009; the defendant had confirmed to the plaintiffs that they had updated their account on 10 June 2009 and that they had instructed their solicitors to withdraw all legal action against them.

[6] The second plaintiff claimed to have no knowledge at all as regards the actions that were undertaken by the defendant or the public auction that was subsequently held. However, she admitted that at all material times, the plaintiffs were in arrears of their loan account. Reference was made to the payment due notice dated 16 April 2010 which shows that a minimum payment of RM6,222.87 was due on 1 May 2010. Since monthly installments due under the facility agreement was RM1,240 per month, this would mean that as at 16 April 2010, there was in arrears of about five months' installments. Although the second plaintiff testified as to her belief that there were only four months of outstanding payments at the time of the public auction on 16 April 2010, however, she admitted that she was unsure about this because the outstanding sum of RM6,222.87 could possibly include both principle and interest.

[7] In order to settle the outstanding dues, the plaintiffs had discussed with the defendant about the withdrawal of EPF contributions to settle the arrears under the 'Skim Pengeluaran Mengurangkan/Menyelesaikan Baki Pinjaman Perumahan'. The plaintiffs had gone to the defendant's Ampang branch around the end of February 2010 in order to obtain their *baki penyata akaun* to be sent to the KWSP. The *penyata* was a condition for obtaining the KWSP withdrawal. However, the *penyata* dated 2 March 2010 was only received on 5 April 2010 which resulted in their application being rejected by KWSP as it was a condition of KWSP that a *baki penyata akaun* would only be valid for a period of one month from the date of its issue by the bank. She agreed in court that it was her responsibility to apply early for the *penyata*.

[8] The reason for the delay in receiving the *penyata* was uncertain. The second plaintiff claimed that she had contacted the defendant's branch numerous times but was given various excuses such as the officer who was responsible for signing the *penyata* was on leave. As such, she disputed para 6 of the defence where it was pleaded that the defendant had attempted to contact the plaintiffs to inform them that the letter was ready but that no one had answered their calls.

[9] After the rejection by KWSP, the second plaintiff had gone again to the defendant's Ampang branch to inform them about the situation. A staff of the defendant had then amended the date of the *penyata* to 5 April 2010.

[10] The second plaintiff claimed that during her dealings with the defendant's staff, no one had informed her about the auction that was scheduled to take place on 16 April 2010. All that she was informed was that her account had been classified as a non-performing loan ('NPL') and as such any cheques from KWSP must be made in the name of the defendant. The plaintiffs contended that they had never imagined that their property had been scheduled for auction and that there was no indication from the defendant that they intended to auction off the said property. On the contrary, they claimed that the issuance of the *penyata baki akaun* would show that the defendant had knowledge of and were aware of the plaintiffs' efforts to settle the balance of the installments in arrears. She disputed that she had known about the scheduled public auction and that that was the reason why she had gone to KWSP to obtain the *penyata*.

[11] With reference to the notice dated 26 March 2010 from Messrs Ghani & Co informing them of the auction that was scheduled to take place on 16 March 2010 at 3pm, the second plaintiff contended that the plaintiffs had never received the said notice. She claimed that the notice was only received by the plaintiffs' former solicitors, Messrs Shahin Akhtar & Partners in July 2010. The notice dated 26 March 2010 was addressed to the first plaintiff at two addresses namely:

(a) No B-13-5 Oakleaf Park Condominium,
Taman Bukit Jaya,
Bukit Antarabangsa,
68000 Ampang
Selangor Darul Ehsan; and

(b) No 8, Jalan BM6/17B
Seksyen 6,
Bandar Bukit Mahkota,
43000 Kajang
Selangor Darul Ehsan.

She claimed that between 2005 and 2008, she had lived at Oakleaf Park Condominium. However in early December 2008, she had moved to her family house in Taman Lembah Keramat because of the landslide at Bukit Antarabangsa which was adjacent to her condominium. After moving, she or her husband would go to Oakleaf Park Condominium every three to four days to collect their mail. As regards their house at Bandar Bukit Mahkota which was undergoing renovations at the material time, the first plaintiff would go there every day. Notwithstanding that the proof of posting at pp 86–87 of

bundle B shows that the notice dated 26 March 2010 as well as the proclamation of sale dated 6 April 2010 had been posted to the plaintiffs at the Oakleaf Park Condominium as well as to Bandar Bukit Mahkota address, the second plaintiff still maintained that the plaintiffs had no knowledge of the public auction. She admitted that she had never given notice to the defendant as to any change of the plaintiffs' address.

[12] The court notes that the second plaintiff admitted receiving the payment due notice dated 16 April 2010 at the Oakleaf Park Condominium address but not the other notices. After receiving their cheques from KWSP, the plaintiffs had deposited them into their loan account on 22 April 2010. The amount of the cheques were RM263 and RM339. On 26 April 2010, the second plaintiff attempted to deposit cash of RM650 into their loan account at the counter of the defendant bank but was informed by the counter staff that the account had been closed. She immediately contacted the defendant's officer named Rachel only to be informed that the account was closed because the said property had been auctioned off on 16 April 2010, eleven days after the issuance of the *penyata baki akaun* by the defendant. *She agreed that the total sum of RM1252* (RM263 + RM339 + RM650) *was insufficient to settle the outstanding arrears and to prevent the auction.*

[13] The second plaintiff complained that she had not received any claim for the arrears of installments or any notice as to the consequences that would follow if she failed to regularise their account. No notice of termination of the loan facility was received by them. The plaintiffs' complaint to Bank Negara had resulted in a formal letter from Bank Negara dated 3 May 2010 to the defendant asking them to respond directly to the complainants on the complaint. This the defendant did vide its letter dated 27 May 2010 (pp 108–109 of bundle B) where at para 5 in p 109, the defendant had responded as follows:

> … Pn Rachel juga telah memberitahu beliau bahawa pihak Bank telah memberi peluang kepada Tuan/Puan membuat penyusunan semula akaun pinjaman pada 18.6.2009 dan Tuan/Puan telah dinasihatkan supaya membuat bayaran ansuran bulanan mengikut yang ditetapkan, jika gagal, pihak Bank akan meneruskan tindakan undang-undang tanpa sebarang rujukan.

[14] Being dissatisfied, the plaintiffs instructed their solicitors to write to the defendant's solicitors complaining about their not being informed about the auction and demanding to be informed as to how the auction was held without their knowledge and when the defendants knew that the plaintiffs were making all efforts to ensure that payments were made towards the said property. She claimed that there was no response from the defendant to this letter. She was also referred to Messrs Ghani & Co's letter dated 17 August 2010 (pp 105–106 of bundle B) to Messrs Shahin Akhtar & Partners which was responded to by

the latter vide its reply dated 27 August 2010 (p 34 of bundle B). She agreed that in the said response, the then solicitors for the plaintiffs had not disputed the statements of the defendant's solicitors and had accepted the explanation offered.

[15] The plaintiffs further complained that they had not received any statement of account for the loan account that had been closed which would clarify whether there was any excess in their loan account after deducting the proceeds of the public auction. No reply was received to their inquiry.

[16] The second plaintiff had also pointed that the valuation report from VPC Malaysia giving a valuation of RM220,000 was dated 18 April 2009 and that the said valuation was time specific as of the date of valuation. The said property was auctioned off at a price of RM262,000 on 16 April 2010.

[17] Noriha bt Harun ('PW1'), a registered valuer, identified the valuation report dated 6 January 2011 that was prepared by her firm, Raine & Home, at the request of the plaintiffs. The said property was inspected by Cik Azlinda bt Mat Rahim but the valuation report was signed by PW1. According to PW1, she had used the comparison method when coming up with the market value of RM300,000. She had used three comparables for sales of properties in the same locality. The court notes that the property that was closest to the said property in size sold for RM290,000 on 7 December 2009.

THE DEFENDANT'S CASE

[18] Ranjit Singh s/o Gian Singh @ Kina Singh ('DW1') is a senior executive with the defendant who had been with the defendant bank for the past eight years. At the material time in December 2009–April 2010, he was the senior executive in the defendant in charge of recovery. He confirmed that the plaintiffs had applied for a loan to finance their purchase of the said property and identified the letter of offer issued by the defendant and the facilities agreement and the deed of assignment entered into between the parties in respect of the loan facility.

[19] *Clause 13.1.1* provides that one of the circumstances under which anevent of default would arise is if:

> the BORROWER defaults in the payment to the BANK of any amount due under the FACILITY or any part thereof or any other moneys to be paid under the SECURITY DOCUMENTS after the same have become due by the BORROWER to the BANK whether formally demanded or not;.

[20] The plaintiffs defaulted in the repayment of their loan facility. On

12 December 2008, judgment in default was entered against them for a sum of RM210,369.59 as at 30 June 2008, interest, and costs. DW1 agreed that vide a letter dated 6 July 2009 (p 81 of bundle A), the defendant had confirmed that it had updated the plaintiffs' account on 10 June 2009 and instructed their solicitors to withdraw all legal action against them. He was unsure if a copy of the judgment was served on the plaintiffs or whether any further letter of demand was issued to them in respect of *fresh defaults* after 8 July 2009.

[21] Reference was also made to *cl 5.1* of the deed of assignment which provides as follows:

> 5.1 On the occurrence of any breach of any terms and conditions in the FACILITIES AGREEMENT or any SECURITY DOCUMENTS as the case may be or on the occurrence of an EVENT OF DEFAULT, the BANK be immediately entitled to but is not obliged to exercise all or any of the following rights and powers:
>
> 5.1.1..
>
> 5.1.2..
>
> 5.1.3 *the right and power to sell and assign the PROPERTY* as the absolute unencumbered owner thereof *by way of public auction or private treaty with or without advertisement or valuation at such price or prices and in such other manner and upon such terms and conditions as the BANK shall in its absolute discretion think fit* free from any interest of the ASSIGNOR hereunder or otherwise and to apply the proceeds of sale in or towards the satisfaction of the FACILITY and all principal and interest and other moneys due to the BANK hereunder and all costs of and occasioned by such sale and sales and the BANK shall only pay to the ASSIGNOR the balance of the proceeds of such sale or sales if any after deduction of such principal and interest and other moneys aforesaid and all the costs if any occasioned by such sale or sales and no assignee or purchaser from the BANK shall be concerned to ascertain whether or not any such default has actually arisen so as to entitle the BANK to exercise its powers of sale or assignment. (Emphasis added.)

[22] DW1 had affirmed that the assignment would still be valid until the registration of the charge. The only restriction to this is when the developer does not agree to a direct transfer of the title from the name of the developer to the name of the bidder. As such, where the individual title is issued, the bank will obtain the consent of the developer to do a direct transfer from the developer to the purchaser. However, in this case, the developer had confirmed its consent to the subselling of the said property.

[23] According to DW1, the plaintiffs had breached the terms of the facilities agreement. Out of the many options open to them, the defendant had opted to auction off the said property. Reference was made to the proclamation

of sale where condition 22 states that the 'Assignee/Bank does not undertake to deliver vacant possession of the property to the Purchaser. The Purchaser after the payment of the balance purchase price in full together with accrued interest thereon, if any shall at his/her own costs and expenses take possession of the property without obligation on the part of the Assignee/Bank or its Agent to give vacant possession'. The reserve price was fixed at RM220,000 and the said property was successfully auctioned off on 16 April 2010 at the highest bid of RM262,000. The reserve price of RM220,000 was derived from the valuation report of VPC Alliance KL Sdn Bhd dated 18 April 2009. He denied that the said property was undervalued at the time of auction but asserted that the defendant had based the valuation on a report which was made within a year.

[24] In respect of the plaintiffs' claim that the defendant had auctioned off the said property although they were agreeable to their proposal, DW1 told the court that the defendant had not received any payments before the auction date. The plaintiffs were aware of the auction date as evidenced by:

(a) the two notifications from the defendant's solicitors, Messrs Ghani & Co, dated 26 March 2010 and 6 April 2010; and

(b) the advertisement by the auctioneer, Messrs Tancorp (M) Sdn Bhd.

He testified that it was the defendant's policy not to call off an auction unless payments were made. The defendant will never call off an auction just because the borrowers were *making arrangements* to withdraw monies from EPF. In this case, the plaintiffs had only forwarded some cheques on 22 April 2010 that is after the auction had already taken place.

[25] As regards the plaintiffs' complaint on the delay in issuing the *baki penyata akaun*, DW1 told the court that although the defendant had prepared the *penyata*, however the plaintiffs had not turned up to collect it. He pointed out that the plaintiffs should have made an extra effort to expedite the issuance of the *penyata* and not just to cast blame on the defendant.

[26] DW1 admitted that the defendant had received a letter from Bank Negara Malaysia inquiring on this matter and requiring them to respond to the plaintiffs. They had duly done so and thereafter there were no further queries from Bank Negara.

[27] The defendant also called Suhaimi bin Yunus ('DW2'), the manager employed by Tancorp (M) Sdn Bhd. Tancorp is one of the panel auctioneers of the defendant. According to DW2, Tancorp had taken steps to advertise the sale in the Metro Central on 2 April 2010. They had also taken steps to paste the proclamation of sale on the premises as can be seen in the photograph of the said property at p 4 of bundle C.

EVALUATION OF THE EVIDENCE AND FINDINGS

[28] In coming to a decision in this case, the court has carefully considered the evidence adduced by the parties as well as the documentary exhibits relied on by them in support of their cases. The court has also perused and considered the submissions and authorities advanced by both parties at the end of the hearing.

BACKGROUND

[29] It is necessary to state briefly the history of the plaintiffs' conduct of its loan account. The plaintiffs do not deny that they were in default of payment of their loan facility. PW2 herself had admitted that they were not consistent with their loan installments. On 12 December 2008, judgment in default was entered against them for a sum of RM210,369.59 as at 30 June 2008, interest, and costs. This can be seen in the judgment in respect of Summons No 2–52–31006 of 2008 at p 59 of *ikatan* B.

[30] The plaintiffs contend that they had never received the summons and statement of claim. The question that crosses the mind is why they had never applied to have the judgment in default set aside. The court finds the explanation of the second plaintiff to the effect that they had not known about the judgment in default to be less than convincing. It is the finding of the court that, at the very latest, on, or about June 2009, the plaintiffs had known about the proposed auction of the said property. This can be seen from the plaintiffs' own letter found at pp 91–93 of bundle A where at the bottom of p 91 the plaintiffs had admitted that the notice of auction had been hung at the gate of the house. The plaintiffs had updated their account by paying RM7,000 before the date of the auction and the defendant had not proceeded with the auction. However, from the plaintiffs' own account, they had thereafter been still inconsistent in meeting their monthly payments, thus leading to a similar situation where they are again in arrears.

Were the plaintiffs were informed about the auction?

[31] It is the plaintiffs' case that they had they had not received any letter of demand or notice from the defendant prior to the auction and that they were under the impression that there were no legal proceedings initiated against them. They knew that they were in arrears but claimed that they were made to believe that the defendant was 'co-operating and obliging to assist them to update and regularize their account'.

[32] The court has considered whether the evidence of contemporaneous documents support the plaintiffs' claims? The court finds that the defendant

had produced proof that two notices of public auction dated 26 March 2010 and 6 April 2010 were duly sent to the plaintiffs. Proof of posting of the 26 March 2010 notice to the plaintiffs at the Oakleaf Park Condominium and the Bandar Bukit Mahkota address appears at items 6, 7, 8 and 15. Proof of posting of the 6 April 2010 notice to the plaintiffs at the Oakleaf Park Condominium and the Bandar Bukit Mahkota address appears at items 11,12, 13 and 14. Apart from the proof of posting of the notices of auction sent by the defendant's solicitors, there is also evidence that the proclamation of sale was advertised in *The Star's* Metro Central on 2 April 2010 as can be seen at p 88.

[33] The court notes that the address of the plaintiffs as stated in the letter of offer and the sale and purchase agreement is:

B-13-5 Oakleaf Park Condominium,

Taman Bukit Jaya, Bukit Antarabangsa,

68000 Ampang,

Selangor Darul Ehsan.

The court further notes that *cl 16.1* of the facilities agreement provides that any notice, demand or other document and all communications between the parties are to be in writing and to be sent by registered post at the addresses or fax numbers as set out in the letter of offer. The address stated in the letter of offer is the Oakleaf Park Condominium address and the second plaintiff had admitted to receiving the payment due notice addressed to them at the said address.

[34] In light of the foregoing evidence and the second defendant's own admission that she had never given any proper notice to the defendant as to any change of address, it is the court's finding that the defendant had duly and properly informed the plaintiffs about the auction date.

Whether an auction can be held before an order for sale is obtained

[35] The court has duly considered the submissions of the plaintiffs that since the individual title for the property had been issued; the defendant could no longer rely on the deed of assignment to dispose of the said property via public auction. It is the plaintiffs' contention that following the provisions of *cl 4.6.2* of the deed of assignment, the defendant 'MUST' issue a notice to the plaintiffs requesting them to execute the memorandum of transfer and charge documents. Thereafter, it would have to obtain an order for sale from the court under O 83 of the Rules of the High Court 1980.

[36] The court has carefully perused cl 4.6.2 relied on by the plaintiffs. Since

this clause appears to be the bone of contention between the parties, the clause is reproduced below for ease of reference:

> 4.6.2 Upon issue of a separate individual title or strata title to the PROPERTY by the relevant authority the ASSIGNOR shall at the ASSIGNOR'S own cost and expense and upon being so required to do so by notice in writing from the BANK take a transfer of and execute a first legal charge over the separate individual title or strata title to the PROPERTY in such form and substance acceptable to the Bank in its discretion in favour of the BANK to secure the payment and/or repayment to the BANK of the FACILITY together with interest, fees, commissions and other charges thereon and all other moneys payable and owing by the ASSIGNOR to the BANK under and by virtue of the FACILITIES AGREEMENT together with all the other moneys payable by the ASSIGNOR and/or the SECURITY PARTY under the SECURITY DOCUMENTS.

[37] Despite a careful study of the aforesaid clause, the court regrets it is unable to find in cl 4.6.2 any provision which makes it a *must* for the defendant to issue a notice to the plaintiffs to execute the memorandum of transfer and charge. On the contrary, what the court observes is an obligation on the plaintiffs themselves to take a transfer of and to execute a first legal charge in favour of the defendant. This they should do at their own cost and expense. They should also do so if so required by the defendant so to do.

[38] It must be borne in mind that the execution of a charge over the said property in favour of the defendant not only benefits the defendant but that it also benefits and protects the plaintiffs as well. And prior to the execution of the charge, the interests of the defendant are protected by the deed of assignment and power of attorney that had been executed by the plaintiffs in the defendant's favour.

[39] Learned counsel for the plaintiffs has submitted that the defendant, by not issuing a notice to the plaintiffs to execute the charge is 'standing behind the Deed of Assignment'. The plaintiffs have referred the court to the case of *PhileoAllied Bank (M) Bhd v Bupinder Singh Avatar a/l Singh & Anor* [2002] 2 MLJ 513; [2002] 2 CLJ 621 where the Federal Court had occasion to consider the question of whether a lender may, without obtaining an order for sale from the court, realise his security consisting of immoveable property in respect of which there is no issue document and no registered charge.

[40] The court finds that the facts of *PhileoAllied Bank* to be somewhat different from the facts of our instant case. In that case, the borrowers had attempted to restrain the bank from proceeding with the sale on the grounds that since the assignment was absolute, the proper procedure was for the bank to commence proceedings for an order of sale under O 31 r 1 of the RHC 1980. The High Court took the view that the assignment was absolute, thereby

creating an equitable charge and thus the appellant had to proceed under O 83 of the RHC 1980. The Court of Appeal, in dismissing the bank's appeal, held that the absolute assignment amounted to an equitable mortgage or equitable charge and that the bank could only auction off the property pursuant to an order under O 83 of the RHC.

[41] On further appeal, the Federal Court took the view that the loan agreement cum assignment ('LACA') amounted to an equitable mortgage and not an equitable charge and that O 83 of the RHC do not apply to mortgages. The Federal Court held that a legal or equitable mortgagee has, upon the mortgagor's default in repayment, the power to sell and convey the legal estate to a third party pursuant to the terms of the mortgage deed *without* an order of court. The Federal Court went on to say that O 83 of the RHC could not be relied upon to compel the bank, an equitable mortgagee, to make an application to the court for an order for sale in the absence of any substantive provision or rule in the National Land Code or at common law imposing such an obligation. As stated by His Lordship Abdul Malek Ahmad FCJ:

> … the court should give effect to and recognise the contractual right as determined between the vendor and the purchaser.

[42] The plaintiffs have also cited the case of *Ooi Chin Nee v Citibank Bhd* [2003] 1 CLJ 548 where the High Court took the view that where there is an issue document of title, the plaintiff must get the property transferred to his name and then register a charge in favour of the defendant bank. His Lordship RK Nathan J then went on to say that the conduct of the bank in proceeding with the proclamation of sale was clearly an attempt to circumvent s 4.05 of the deed of assignment. Section 4.05 clearly spell out that the plaintiff ought, upon the issuance of the registered document of title, to take a transfer of the property and execute a legal charge. And once this is done, the defendant would have to apply for leave to foreclose. The court thus granted an injunction to restrain the defendant from selling the property by way of public auction.

[43] The court notes that in the case of *Ooi Chin Nee*, the plaintiff had applied for an injunction to restrain the sale by public auction. This was not done by the plaintiffs in our instant case. The court further notes that the learned judge had referred to the necessity of applying for leave to foreclose 'once this is done', referring to the execution of the legal charge. Following this argument, the court is unable to see the need to apply for leave to foreclose if in fact no charge was ever executed.

[44] The defendant has referred the court to the more recent case of *Hong Leong Bank Bhd v Goh Sin Khai* [2005] 3 MLJ 154; [2005] 3 CLJ 24 where the core question that came up for determination of the court was whether a

financier having an absolute assignment could realise his security after the issuance of an individual title, without registering a NLC charge and applying to court for an order for sale. In that case, His Lordship Syed Ahmad Helmy J held at pp 44–45 as follows:

> The law in relation to absolute assignments is clear. An absolute assignment is an equitable mortgage and the essence of a mortgage is that there is a transfer of the ownership to the mortgagee. The journals are also replete with cases where courts have ruled that an absolute assignment serves to transfer absolutely the legal right to the chose in action to the assignee.
>
> There is no statute or rule in common law that once an individual title or strata title is issued, the absolute assignment is extinguished. Likewise, there is nothing to say that the assignee must extinguish the assignment by ensuring that the assignor takes a transfer of the property and creates a charge in favour of the lender. In the absence of any statutory provision or rule of common law, the court must give effect to the intention of the parties that is reflected in the contractual provisions of the assignment. This is plain from the judgment of Abdul Malek Ahmad FCJ in *PhileoAllied* where His Lordship said that in such cases 'the court should give effect to and recognise the contractual rights'.

[45] This court is in full agreement with the decision of Syed Ahmad Helmy J in *Hong Leong Bank*. The court finds that the issuance of the individual title for the said property in this case did not mean that the defendant could no longer rely on the deed of assignment. It is the court's finding that the absolute assignment is *not* extinguished and that the plaintiffs' contention that the defendant could no longer rely on it to dispose of the said property by public auction is totally without basis. The provisions of cll 4.6.2 and 4.7 were so worded to protect the lender if the borrower is negligent or refuses to execute a charge in the lender's favour. It cannot and should not be used against the lender who is attempting to release his security following the default of the borrower in a situation where the individual title has been issued by the land authority but no charge has been executed by the borrower.

Whether letter of demand etc required

[46] Based on the finding above that the defendant was entitled to proceed based on the deed of assignment, the court finds that the issues raised by the plaintiffs as regards whether the defendant should have issued a letter of demand, a notice of termination or a *notis penamatan* to be a non-starter. It is the court's finding that there under the deed of assignment, the defendant was entitled to proceed to auction off the property in the event of a default, and this had clearly occurred in this case.

Significance, if any, of the application for withdrawal of EPF

[47] Much has been made by the plaintiffs as regards the fact that they had

intended to apply to EPF for a withdrawal under the 'Skim Pengeluaran Mengurangkan/Menyelesaikan Baki Pinjaman Perumahan' in order to settle the arrears. It is the court's finding that even if though the defendant may have known about the plaintiffs' actions, the court does not find that the proposed and subsequent withdrawal of RM263 and RM339 from EPF to bear any significance in this case. The court is of the considered view that the plaintiffs cannot expect the defendant to call off a scheduled auction merely on the strength of such an act as an application to withdraw some EPF contributions for payment towards reducing a housing loan. The court accepts the explanation of the defendant that it is only upon payment of the outstanding amount *before* the auction date that the defendant would consider calling off the auction. In any event, with the benefit of hindsight, the court finds that the sum of RM1252 (RM263 + RM339 + RM650) attempted to be deposited into the loan account to be grossly insufficient to settle the outstanding arrears.

Whether the reserve price was far lower than the market value

[48] One of the agreed issues to be tried relates to the reserve price fixed for the said property. It is the plaintiffs' contention that the reserve price of RM220,000 is far lower than the market value of the said property. The complaint of the plaintiffs is that the reserve price of RM220,000 was derived from VP Alliance's valuation report dated 18 April 2009. The property was sold at auction on 16 April 2010 for a price of RM262,000.

[49] The court has duly considered the evidence of Noriha bt Harun (PW1), a registered valuer with Raine & Home and perused her valuation report dated 6 January 2011. The court has duly noted her three comparables of sales transactions in the same locality. In light of the fact that these three transactions took place on 7 April 2010, 7 December 2009, and 9 October 2009 respectively, it is not surprising that VP Alliance's valuation report which was made on 18 April 2009 and prior to all these transactions had made no reference to those sales. The court finds that comparables 1 and 3 not to be good comparables as the land area of comparable 1 was much smaller at 1572 sq ft and that of comparable 3 was much larger at 4252 sq ft. The property that was closest to the said property in size sold for RM290,000 on 7 December 2009. In any event, the court finds that all three comparables of PW1 were of transactions *after* the auction and would therefore not constitute good comparables.

[50] The court has also examined the three comparables given by VP Alliance. Whereas comparables 1 and 2 would involve properties with land areas which were substantially bigger, it is noted that comparable 3 had exactly the same land size as the said property. The transaction in comparable 3 sold on 4 August 2008 at RM245,000. In light of these factors and the fact that the

valuation report of VP Alliance was made on 18 April 2009 and within a year of the auction held on 16 April 2010, the court finds that the defendant was entitled to rely on the valuation report of VP Alliance for the determination of the reserve price.

[51] The court has also looked at the authorities cited by learned counsel for the plaintiffs in respect of this issue. *People Realty Sdn Bhd v Hong Leong Bank Berhad & Anor* [2007] 6 MLJ 595; [2008] 1 CLJ 73 and *Bank Kerjasama Rakyat Malaysia v Daya Plaza Sdn Bhd*; *Empire Possession Sdn Bhd (Intervener)* [1998] 5 CLJ 79 were relied upon by the plaintiffs to show that where a challenge is made on the valuation of a land, it would be necessary to submit a valuation report to challenge the valuation report submitted by the other party. Also cited was the case of *Ng Tiou Hong v Collector of Land Revenue, Gombak* [1984] 2 MLJ 35; [1984] 1 CLJ (Rep) 289 where the Federal Court set out five principles to be applied when determining the market value of land, namely:

(a) market value means the compensation to be determined by reference to the price which a willing vendor might reasonably expect to obtain from a willing purchaser;

(b) the market price can be measured by a consideration of the prices of sales of similar lands in the neighborhood or locality and of similar quality and positions;

(c) the potentialities of the land must be taken into account;

(d) regard must be given as to whether its locality is within or near a developed area, its distance to or from a town, availability of access road; and

(e) estimates of value by experts can be considered but not too much weight should be given unless it is supported with other evidence.

As was held by His Lordship Syed Agil Barakbah FJ:

> The safest guide is evidence of sales of similar lands or similar quality and position in the locality *at or prior to the time of acquisition.* The prices of such sales can be used as comparables subject to making allowance for all the circumstances. (Emphasis added.)

[52] The court has also considered the case of *Malayan Banking Bhd v Lim Poh Ho & Anor* [1997] 1 MLJ 622; [1997] 2 CLJ 516 cited by learned counsel for the defendant. In that case, the respondents had taken a housing loan of RM78,400 from the appellant bank and charged the house to the bank as security. The respondents defaulted in paying the loan. Pursuant to the terms of the loan agreement, the bank obtained a valuation of the house and proceeded to sell it by way of public auction. At three public auctions, the reserve price was lowered progressively from RM110,000–RM100,000 and subsequently to

RM80,000 but there was still no bidder for the property. It was at the fourth attempt when the reserve price was lowered to RM56,000 that the property was finally sold off at that price.

[53] In that case, the respondent had contended that the bank was negligent in selling the property at RM56,000 and not at RM100,000, which they contended was the prevailing market rate of the property, and counterclaimed for damages. At first instance, the High Court had acceded to the respondent's arguments and had dismissed the bank's claim and awarded the respondent RM44,000. On appeal by the bank, the Court of Appeal, in allowing the appeal held, inter alia, as follows:

(a) a chargee exercising its power of sale could only be held liable for negligence if there is some *deliberate or willful conduct* on its part in selling for a lower price. If the power of sale is exercised *in good faith* for the purpose of protecting his security, then he is not liable to the chargor even though he might obtain a higher price and even though the terms may be regarded as disadvantageous to the chargor; and

(b) as for proof of damage it can never be enough for the mortgagor to make a bare assertion that the price was too low even if he calls a valuer to say so because the 'true market value' or the 'best price' of a property is not what a mortgagor or a valuer thinks it is. *The true commercial value of a property is the actual price that the property will fetch when it is put up for sale in the open market.*

[54] Following and in light of the authorities above, this court finds that the fact that PW1 was of the view that the market value of the property was RM300,000 does not persuade the court that that should have been the reserve price of the said property. The comparables presented by PW1 were of sales transactions which took place *after* the date of the auction. Further, no evidence was produced which would point to lack of good faith or some deliberate or willful misconduct on the part of the defendant. The court finds that the defendant was entitled to rely on the valuation report of VP Alliance in fixing the reserve price of RM220,000. In any event, the said property sold at RM262,000 and that is, in the court's view, the true commercial value of the said property.

CONCLUSION

[55] In conclusion, the court finds that the plaintiffs have failed to make out

their case against the defendant on a balance of probabilities. The plaintiffs' claim is accordingly dismissed with costs to be taxed unless otherwise agreed.

Plaintiffs' claim dismissed with costs.

Reported by Kanesh Sundrum